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No. .....
IN THE

Supreme Court of the United States

October Term, 1982

KENNETH THOMAS DILL, MARK RICHARD BARTHOLOMEW and VINCENT SCOTT PERRI,

Petitioners,

vs.

DAVIES NITRATE CO. and OLIN CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COUKT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented.

1. Whether the lower Court's refusal to consider Plaintiffs' expert's opinion on an ultimate issue of fact in response to Defendants' motions for summary judgment is contrary to the new Federal Rules of Evidence, Rules 702-705, which expressly provide that opinion evidence on an ultimate issue of fact is admissible.

2. Whether Plaintiffs were deprived of their constitutional right to jury trial under the Seventh Amendment and due process under the Fourteenth Amendment by (a) the lower court's refusal to consider Plaintiffs' expert's opinion on an ultimate issue of fact, and (b) its order granting Defendants' motion for summary judgment on the ground there was no triable issue concerning this very fact.

3. Whether the decision of the Ninth Circuit has improperly shifted the burden on motions for summary judgment to the resisting party, plaintiffs, to show the existence of a triable issue of fact without first requiring the moving party, defendants, to show the absence of such issue, contrary to this Court's decision in *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Kenneth Thomas Dill, Mark Richard Bartholomew and Vincent Scott Perri respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 26, 1982.

OPINIONS BELOW

The unreported memorandum opinion of the Court of Appeals for the Ninth Circuit is reproduced as Appendix "A" hereto. The unreported opinion of the United States District Court, Central District of California is reproduced as Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 26, 1982. A timely Petition for Rehearing and Suggestion that Rehearing be En Banc was denied on June 8, 1982 (a copy of the order denying rehearing is reproduced as Appendix "C" hereto), and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution:

   Fifth Amendment (in relevant part):

   "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

   Seventh Amendment:

   "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. Federal Rules of Evidence:

   Rule 702:

   "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

   Rule 703:

   "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the

hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Rule 704:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Rule 705:

"The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

3. Federal Rules of Civil Procedure, Rule 56. Due to the length of Rule 56, it is not set forth verbatim at this point and instead is set forth as Appendix "D" hereto. (U.S. Sup.Ct. Rules, Rule 21.1(f) and (k), 28 U.S.C.)

STATEMENT OF THE CASE

The facts of the case are as follows:

1. On September 20, 1975, Petitioners Kenneth Thomas Dill, Mark Richard Bartholomew and Vincent Scott Perri were national guardsmen on duty at Fort Irwin, California. As part of their duties on that date, Petitioners were engaged in the firing of a 155 mm Howitzer Cannon. (Deposition of Mark Richard Bartholomew, p. 131 to p. 133.) Petitioners placed the propellant charge in the breech of the artillery piece and prepared the cannon for firing. The projectile or artillery round was fused. (Depositions of Mark Richard Bartholomew, p. 132 to p. 133, Kenneth Thomas Dill, p. 63 to p. 64, p. 88 to p. 89, and Vincent Scott Perri, p. 91 to p. 92.) When Kenneth Dill pulled the lanyard to fire the

artillery piece, the round exploded prematurely "in-bore", *i.e.*, within the artillery piece itself, causing great and tragic injury to Dill, Bartholomew and Perri. (Ninth Circuit's opinion, page 1 [Appendix "A"]; Depositions of Kenneth Thomas Dill, p. 65 to p. 74, and Mark Richard Bartholomew, p. 133 to p. 134.)

2. Respondent Olin Corporation is the manufacturer of the propellant charge and Respondent Davies Nitrate Co. is the manufacturer of potassium nitrate, one of the chemicals used in the charge. (Ninth Circuit's memorandum opinion, page 1 [Appendix "A"].)

3. Petitioners filed this diversity action in the United States District Court for the Central District of California. (28 U.S.C. §1332(a)(2).) (Complaint for Personal Injuries [C.R. 1, et seq.[1]].)

4. On May 3, 1978, Respondent Davies Nitrate Co. filed a Motion for Summary Judgment (C.R. 355, et seq.), based on the affidavits of its attorney H. Andrew Wasmund (C.R. 357-359) and plant manager Thomas W. Wheaton (C.R. 440-442). (The affidavits of Mr. Wasmund and Mr. Wheaton are reproduced as Appendices E and F, respectively.) On May 23, 1978, Respondent Olin Corporation filed a Motion for Summary Judgment supported by the Affidavit of Byron C. Baldridge. (C.R. 364, et seq. [Mr. Baldridge's affidavit is reproduced as Appendix G].)

5. On June 26, 1978, Petitioners filed opposition to the motions for summary judgment (C.R. 397, et seq.), supported by the affidavit of Shelley Braverman (C.R. 436-437 [reproduced as Appendix H]). Mr. Braverman's affidavit states the following (at C.R. 436-437):

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[1] "C.R." refers to the Clerk's Record prepared for the appeal to the Ninth Circuit.

"1. I am a munitions and fire arms expert and have previously qualified to testify as an expert, and have testified in Federal Court, on the subject of the causes of and product defects leading to premature in-bore explosion in military canon of the same or similar type as is represented in the within action of Kenneth Thomas Dill, et al. vs. Etowah Manufacturing Company, et al., defendants; said accident having taken place on September 20, 1975 at Ft. Irwin, California.

"2. I have over thirty-two (32) years of experience dealing with aspects of design and manufacture of fire arms, explosives and munitions.

"3. At the request of attorneys for plaintiffs, I have investigated the subject accident of September 20, 1975, involving a premature in-bore explosion of a 155 mm artillery shell at Fort Irwin, California, September 20, 1975. I have personally visited the Picatinny Arsenal in Dover, New Jersey and have personally examined remaining fragments of the subject artillery shell. I have reviewed photographs of the accident scene and of the remaining shell fragments. I have reviewed Army documents and reports supplied to me by attorneys for the plaintiffs.

"4. Based upon my knowledge and investigation of the accident and based upon my years of training and experience in the armaments and munitions field, it is my opinion that the subject round was fused prior to the premature in-bore explosion of September 20, 1975: it is further my opinion that the substandard and/or defective condition of the propellant charge was a cause of the premature in-bore explosion of September 20, 1975."

6. On October 18, 1978, the United States District Court, Central District of California filed findings of fact and conclusions of law, which are reproduced as Appendices I and J, respectively. On October 18, 1978, the district court

filed its "Memorandum to Counsel" setting forth its reasons for granting summary judgments in favor of Davies Nitrate Co. and Olin Corporation. (Appendix "B".) On October 20, 1978, the district court filed and entered summary judgments in favor of Davies' Nitrate Co. and Olin Corporation. (The district court's orders are reproduced as Appendices K and L.)

7. Petitioners appealed. On March 26, 1982 the Court of Appeals for the Ninth Circuit filed its Memorandum affirming the summary judgments by a 2-1 vote, Judge East dissenting. (Appendix "A".) The Ninth Circuit's Memorandum states, in pertinent part, the following:

> "The appellants argue that a genuine issue of material fact was created by their expert's affidavit which stated that the 'substandard and/or defective condition of the propellant charge was a cause of the premature in-bore explosion. . . .' The affidavit does not mention any defect in the chemical manufactured by appellee Davies Nitrate, nor does it identify the defect or describe the nature of the substandard condition of the propellant. An affidavit so devoid of particulars does not create a triable issue of fact as to the existence of a defect; it is no more than an assertion concerning the ultimate issue to be proved. As this court stated in *United States v. Various Slot Machines*, 658 F.2d 697, 700 (9th Cir. 1981), 'in the context of a motion for summary judgment, an expert must back up his opinion with specific facts.' *See* 6 *Moore's Federal Practice*, ¶56.22[1], at 1316 (1980) ('The affidavit [in a Rule 56 motion] is no place for ultimate facts and conclusions of law. . . .').
>
> "This Court's decision in *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980), is readily distinguishable since in that case, a negligence action, the expert's affidavit clearly identified the precise substandard con-

dition (insufficient lighting) which caused the accident. We made that distinction in *United States v. Various Slot Machines, supra*, at 701. The expert's affidavit in this case did not identify the defect or substandard condition."

8. Following the Ninth Circuit's decision, Petitioners sought a rehearing and suggested rehearing en banc. Petitioners stated they stand ready to come forward with a supplemental affidavit by their expert setting forth the underlying facts and data supporting his opinion. (Petition for Rehearing and Suggestion that Rehearing be En Banc.)

REASONS FOR GRANTING REVIEW

I.

THE NEW FEDERAL RULES OF EVIDENCE, RULES 702-705, PROVIDE THAT OPINION EVIDENCE ON THE ULTIMATE ISSUE IS ADMISSIBLE. ON MOTION FOR SUMMARY JUDGMENT, THE NINTH CIRCUIT CONTINUES TO APPLY THE FORMER RULE PROHIBITING OPINION TESTIMONY ON THE ULTIMATE ISSUE.

Prior to adoption of the Federal Rules of Evidence, experts were precluded from testifying on the ultimate issue in a case and were first required to state the facts and data they relied on in forming their opinion. Enactment of the Federal Rules of Evidence changed this.[2] Rule 704 abolished the "ultimate issue" rule and Rule 705 authorizes the admission of an expert's opinion without prior disclosure of the underlying facts or data. (*Case & Co., Inc. v. Board of Trade of City of Chicago* (7th Cir. 1975) 523 F.2d 355, 361 ["The ultimate issue rule, however, is abolished by Rule 704 of the Federal Rules of Evidence"]; 11 *Moore's Federal Practice*, §705.10 ["Rule 705 authorizes the admission of the opinion testimony of an expert without the prior disclosure of the facts or data which underlie his opinion, unless the trial court requires otherwise. The rule relies upon effective cross-examination to reveal the factual basis for an expert's opinion which, in turn, permits the fact finder to determine what weight to accord the testimony"]; see also Rule 705 — Notes of Advisory Committee on Proposed Rules of Evidence.) It necessarily follows that "[o]pinion testimony that would be admissible at trial may be submitted in an affidavit" in connection with a motion for summary judgment. (*Case & Co., Inc. v. Board of Trade of City of Chicago, supra*, 523 F.2d at 361; *Paton v. La*

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[2]This Court has not yet interpreted Rules 702-705 in this context.

Prade (3rd Cir. 1975) 524 F.2d 862, 871 ["[W]here, as here, the affidavits are submitted to oppose the grant of summary judgment, opinion evidence is appropriately considered to support the existence of a disputed issue of fact"].)[3]

Congress clearly intended that an expert, once qualified, could offer an opinion on the ultimate issue without first setting forth supporting facts or data. (See 3 *Weinstein's Evidence* ¶705, pp. 705-1 to 705-2 for an example of the abbreviated type of expert opinion anticipated under the rule.)

Moreover, an expert's opinion as to the ultimate issue to be proven, standing alone, may be sufficient to support a verdict. (See *Lumbermen's Mut. Cas. Co. v. Ind. Acc. Comm.* (1946) 29 Cal.2d 492, 500 ["The failure . . . to state the reason for the expert opinion does not strip it of probative value to the point where it is not substantial evidence supporting the decision. . . . It goes to the weight of such evidence. . . . [Defendants] had the right to cross-examine the witnesses if they saw fit"]; see also *People v. Allen* (1963) 212 Cal.App.2d 857, 861.)[4]

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[3]In this products liability case, Plaintiffs' expert, Mr. Braverman, addressed by affidavit the ultimate issue to be proven, *i.e.*, whether there was a defect. (See *Hughes v. American Jawa, Ltd.* (8th Cir. 1976) 529 F.2d 21, 25 ["Since it is clear that the existence or non-existence of a defect is a 'material' fact in this strict tort liability litigation, we must decide whether there is a 'genuine' issue concerning this particular fact"].)

[4]Our research has not found any federal cases which have addressed this point. However, in the California cases cited above, the courts were considering expert opinions rendered under California Evidence Code section 802, one of the state codifications which served as model for Rule 705. (See Federal Rules of Evidence, Rule 705 — Notes of Advisory Committee on Proposed Rules of Evidence; see also 11 *Moore's Federal Practice*, §705.01.)

Nevertheless, the Ninth Circuit, as demonstrated by its decision in this case, requires something more to permit a case to survive a motion for summary judgment: It relies on the abolished "ultimate issue" rule and requires plaintiffs' experts to preliminarily set forth facts and data to back up their opinion.[5] This is directly contrary to the law because it requires more evidence to overcome a summary judgment motion than is required to support a verdict. As a consequence, litigants are being deprived of their right to a jury trial and to due process of law. Accordingly, this Court should grant certiorari to assure uniform and correct application of the rules.

II.

UNLESS THE SAME RULES OF EVIDENCE APPLY TO EXPERT OPINION SUBMITTED IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AS APPLY TO THE PRESENTATION OF SUCH OPINIONS AT TRIAL, PLAINTIFFS WILL CONTINUE, AS IN THIS CASE, TO BE DEPRIVED OF THEIR RIGHT TO JURY TRIAL AND TO DUE PROCESS OF LAW EVEN THOUGH THEY HAVE PRESENTED EVIDENCE WHICH WOULD BE ADMISSIBLE AT TRIAL AND SUFFICIENT TO SUSTAIN A VERDICT IN THEIR FAVOR.

By applying the abolished rule, the Ninth Circuit forces plaintiffs out of court on summary judgment even though they have made an evidentiary showing which would be

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[5]In this case, the Ninth Circuit did not question the qualifications of plaintiffs' expert or the admissibility of his opinion that the "substandard and/or defective condition of the propellant charge was a cause of the premature inbore explosion", but found his affidavit "does not create a triable issue of fact as to the existence of a defect" because it is "so devoid of particulars", "is no more than an assertion concerning the ultimate issue to be proved" and " 'in the context of a motion for summary judgment, an expert must back up his opinion with specific facts.' " (Appendix "A", pp. 1-2.)

sufficient to go to the jury at trial.[6] In effect, the refusal to apply the Federal Rules of Evidence to motions for summary judgment results in the anomalous situation where it is easier for defendants to dispose of a controverted issue of fact on summary judgment motion than it would be for them to do so at trial.

We do not suggest that the Federal Rules of Evidence prevent a court from granting summary judgment against a party who relies solely on an expert's opinion that consists merely of "theoretical speculations", of "pettifoggery", of "quibble", or "is incontrovertibly demonstrated to be false", as was the case in *United States v. Various Slot Machines on Guam, supra,* 658 F.2d 697, 699-701. But that is not the effect of the Ninth Circuit's application of the abolished "ultimate issue" rule in summary judgment proceedings. The effect is much broader: It rejects qualified expert opinion on the ultimate issue, even though such opinion evidence is admissible and sufficient to sustain a verdict at trial. The application of a discredited and abolished rule of evidence deprives litigants of their right to a jury trial. Review by writ should be granted.

III.

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN ADICKES v. S.H. KRESS & CO. (1970) 398 U.S. 144 AS TO THE PROPER STANDARD FOR GRANTING A MOTION FOR SUMMARY JUDGMENT. THE NINTH CIRCUIT IMPROPERLY SHIFTS THE BURDEN TO PLAINTIFFS TO SHOW A TRIABLE ISSUE OF FACT WITHOUT FIRST REQUIRING THE DEFENDANTS TO SHOW THE ABSENCE OF SUCH ISSUE.

In this products liability action, Davies Nitrate Co. and Olin moved for summary judgment. (See their affidavits in support of the motions for summary judgment [Appendices

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[6]See footnote 5 above.

E, F, and G].) Defendants were the moving parties on the motions for summary judgment and as such, it was their burden to show that no genuine issue existed as to any material fact and that they were entitled to a judgment as a matter of law. (Fed. Rules Civ. Proc., Rule 56(c), 28 U.S.C.; *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144, 160, 26 L.Ed.2d 142, 155, 90 S.Ct. 1598 [" '[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*' " (Emphasis by the Court)].) Their showings totally failed to establish the absence of all material issues of fact.

Nevertheless, in direct conflict with this Court's decision in *Adickes v. S.H. Kress & Co., supra,* 398 U.S. at 160, both the district court and the Ninth Circuit ignored Defendants' failure to sustain their burden of proof on the motion for summary judgment, never addressed this issue, and improperly looked only to Petitioners' showing in opposition to the motions for summary judgment to determine whether a triable issue of fact existed. (See Appendix A, the Ninth Circuit's memorandum opinion, and Appendix B, the district court's memorandum to counsel.) This effectively shifts the burden of proof from defendants (where it belongs as a matter of law) to plaintiffs.[7]

Finally, the correctness of the decision below, even assuming the propriety of the tests employed, is open to se-

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[7]For example, in this case the district court stated that plaintiffs were unable to assert a factual basis for finding that the product of any of the defendants was in any manner defective or contributed to the untimely explosion and that "[t]his is not surprising, because the nature of the accident, the large numbers of component parts that made up the projectile, and the many intervening circumstances between manufacture and explosion, probably renders such a showing impossible." (Appendix B.)

rious question. The affidavits show quite plainly that a genuine triable issue of fact exists as to whether Defendants' products were defective and/or substandard and whether such defect and/or substandard condition contributed to Plaintiffs' injuries. The refusal of the district court and the Ninth Circuit to permit these Plaintiffs their right to a trial by jury in this case cannot be justified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
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